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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 29, 1988

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

OCA FILE leg

TO: Legislative Liaison Officer -

Department of Commerce (Levitt 377-3151)
United States Trade Representative (Parker 3432)
Department of Labor (Zinman 523-8207)
Department of Defense (Brick 697-1305)
National Security Council
Central Intelligence Agency

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SUBJECT: Justice draft report on H.R. 3651, "Antiterrorism and Arms Export Amendments Act of 1987."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than FRIDAY, MAY 6, 1988.

Questions should be referred to Sue Thau/Annette Rooney (395-7300), the legislative analyst in this office.

Ronald K. Peterson

RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

Enclosures

cc: J. Eisenhower
J. McClelland
A. Donahue

SPECIAL



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Dante B. Fascell
Chairman
Committee on Foreign Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice with respect to certain constitutional issues raised by the April 19, 1988, Foreign Affairs Committee amendment to H.R. 3651, the "Antiterrorism and Arms Export Amendments Act of 1987." The Department of Justice is concerned that the legislation, as currently drafted, is subject to interpretations that would unconstitutionally curtail the Executive's authority to conduct the foreign relations of the United States. Accordingly, unless the bill is further amended so as to foreclose such interpretations, the Department will recommend disapproval.

We understand that three of the Committee's subcommittees have already received testimony on the earlier version of this bill from Allen Holmes, the Assistant Secretary of State for Politico-Military Affairs, as well as others in the Administration; accordingly, we will discuss primarily those provisions that give rise to constitutional concerns.

The April 19 amendment would amend Section 40 of the Arms Export Control Act, 22 U.S.C. 2780, to prohibit the United States from exporting munitions items to countries that, as determined by the Secretary of State, support international terrorism. Similarly, the United States would be prohibited from providing financial assistance for the acquisition of munitions items by any such country, consenting to or providing a license for the transfer of munitions items to any such country, or "[o]therwise facilitating" the acquisition of any munition items by any such country. Similar prohibitions would apply to United States persons, including the President and other members of the executive branch, all of whom would additionally be prohibited from "[t]aking any other action which would facilitate the acquisition, directly or indirectly, of any munitions item" by any such

country.¹ These prohibitions would be subject to²waiver by the President in certain circumstances. (Section 2.)²

Several of the prohibitions contained in the bill are cast in imprecise or undefined terms. For example, the United States may not "otherwise facilitate" the acquisition of any munitions item by any such country. (Section 2.) Similarly, United States persons may not take "any other action which would facilitate the acquisition, directly or indirectly, of any munitions item" by listed countries. (Section 2.) Terms such as "directly or indirectly," "any other action," and "otherwise facilitating" could be interpreted to prohibit, for example, consultation between the United States and one of its allies regarding transfers of munitions items the ally may wish to make. Any such limitation on the President's authority to discuss certain issues with foreign governments, or to recommend or concur in courses of action taken by our allies, would pose grave constitutional problems. The risk of such an interpretation is particularly great where, as here, nonspecific terms are combined with the exceptionally broad definition of "munitions item" in Section 2 (which appears to include items of foreign manufacture that are never shipped into or through the United States).

The courts have long recognized that the President possesses inherent power, derived from the Constitution, to exercise great discretion in managing the external relations of the country. As the Supreme Court stated in United States v. Curtiss-Wright

¹ "United States persons" would be defined to include any citizen or permanent resident alien of the United States, any sole proprietorship, partnership, company, association, or corporation having its principal place of business within the United States or organized under the laws of the United States, or any state or possession of the United States, "any other person with respect to that person's actions while in the United States," and certain foreign subsidiaries of United States persons, to the extent determined by regulations to be issued by the Secretary of State. (Section 2.)

² The bill would also change procedures and standards for the issuance of arms export licenses and arms sales, as set forth in the Arms Export Control Act and the Export Administration Act of 1979. (Sections 3 and 4.) The United States would be prohibited from providing assistance to governments that support international terrorism, again subject to waiver by the President. (Section 5.) The President's reporting requirements to Congress under the Arms Export Control Act and the Foreign Assistance Act of 1961, as well as with respect to interagency transfers by the Department of Defense, would be changed. (Sections 7 and 8.) Finally, 22 U.S.C. 1732 would be amended to specify that the President may take whatever actions, not otherwise forbidden by law, that are necessary to free American citizens wrongfully imprisoned by foreign governments. (Section

Export Corp., "the President [is] the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress." 299 U.S. 304, 319-320 (1936). Congress, to be sure, has the power to regulate foreign commerce and thus to prohibit entirely the shipment of arms by the United States or a United States citizen to a particular country.³ Yet that power does not extend to circumscribing the President's inherent powers to articulate the foreign policy of the United States in consultations with other governments. Accordingly, we believe that the bill must be amended to make clear that it does not prohibit the President or his subordinates in the executive branch from communicating with foreign countries concerning arms transfers.

In light of our constitutional concerns, in the absence of clarifying amendments responsive to the constitutional issues, we would recommend to the President that he disapprove the proposed legislation.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General

² (Cont.) 9.)

³ See Letter from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, to Senator Arlen Specter at 2 (December 16, 1987).